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IN THE

Supreme Court of the United States

October Term, 1967

No. 897

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

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No.

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner ("TWA") prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review a judgment of that court affirming orders of respondent (the "Board") requiring TWA to refund $2,152,000 in subsidy mail pay and denying TWA's claim for additional mail pay.[1]

Opinions Below

The Board's opinions appear in Appendix B, printed separately.[2] The opinion of the Court of Appeals, which is not yet reported, appears in Appendix C, attached hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on September 12, 1967. No rehearing or extension of time

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[1] The Board's principal order, No. E-22022, dated April 12, 1965 (not yet reported), fixed final rates for TWA's transatlantic mail operations. It reflected earlier decisions made in Orders 8833, dated December 20, 1954 (19 C. A. B. 464) and E-10117, dated March 23, 1956 (23 C. A. B. 307, 312).

[2] Citations of the Board's reported opinions are in note 1, *supra.*

to petition for certiorari was sought. This court's jurisdiction is invoked under 28 U. S. C. §1254(1) and 49 U. S. C. §1486(a) and (f).

Questions Presented

Did the Board, in determining TWA's need for transatlantic mail pay under Section 406 of the Civil Aeronautics Act (the "Act"):

1. Frustrate improperly the national defense policy of §168 of the Internal Revenue Code by awarding TWA millions less in mail pay than it would have received if it had not exercised its right under §168 to accelerate amortization of emergency facilities?

2. By computing receipts and expenses on an inconsistent basis, improperly fail to allocate a 1946 tax refund received by TWA?

3. Disregard improperly TWA's legal liability to pay employees "termination indemnities," imposed by foreign law during the review period, and measured by the employees' services rendered in that period, as part of TWA's cost of carrying the mail during that period?

4. In disallowing two-thirds of TWA's "losses" as a result of a 1953 navigators' strike violating the Railway Labor Act and the union's no-strike covenant:

(a) Erode improperly the policy of the Railway Labor Act and exceed the authority conferred on the Board by §406(b) of the Act?

(b) Rely improperly on concessions or supposed admissions obtained from TWA by the unlawful economic duress of that strike?

Statutes Involved

Pertinent statutes appear in Appendix A, attached.

The principal statute involved is §406 of the Civil Aeronautics Act (Act of June 23, 1938, c. 601, 52 Stat. 973, 998,

49 U. S. C. §486), now §406 of the Federal Aviation Act of 1958 (Act of August 23, 1958, 72 Stat. 731, 763, as amended, 49 U. S. C. §1376).

Involved on particular questions are (1) §168 of the Internal Revenue Code of 1954 (68A Stat. 52, 26 U. S. C. §168), relating to accelerated amortization of emergency facilities; (2) §122 of the Internal Revenue Code of 1939 (53 Stat. 867, 56 Stat. 807, 844, 847, 848), relating to loss carry-backs; and (3) §§1, 2 and 201-205 of the Railway Labor Act (44 Stat. 577, as amended, 48 Stat. 1185, as amended, 49 Stat. 1189-1190, 45 U. S. C. §§151, 151a, 152, 181-185, respectively).

Statement of the Case

The questions at issue here arose in fixing TWA's subsidy rate for carrying transatlantic air mail from February 1946 through December 1953.

The Temporary Transatlantic Mail Rates

TWA has long been a domestic air carrier. In February 1946, TWA began to carry transatlantic mail regularly [897].[3] The Board did not reopen TWA's domestic service mail rate and fix an overall rate for the system. Instead it instituted in July 1946 proceedings to fix transatlantic mail rates for all certificated carriers, including TWA and American Overseas Airlines, Inc. ("AOA"). They were eventually consolidated into the "Transatlantic Mail Rate Case" [16-19]. Temporary transatlantic mail rates were established, subject to retroactive adjustment when final rates were fixed.

The "Offset" Phase of the Case

Hearings in the Transatlantic Final Mail Rate Case were completed when this court ruled in *Delta Air Lines,*

[3] Numbers in brackets not otherwise identified refer to pages of the Joint Appendix in the Court of Appeals. Italics are added unless otherwise noted.

Inc. v. *Summerfield,* 347 U. S. 74 (1954), that a carrier's "need" for a subsidy on one division had to be determined in light of all its revenue. Any excess revenue of its other divisions had to be offset against the "need" of the subsidized division.

Accordingly, the Board instituted an "offset" proceeding to determine if TWA's domestic operations had any "excess" revenue [51].

Proceedings Through the First Decision by the Court of Appeals

1. The Board first resolved the issues relating to TWA's transatlantic operations [75, 459]. One of them became the subject of later proceedings.

Without hearing evidence, the Board originally took official notice of a July 1953 navigators' strike affecting TWA's transatlantic operations. For policy reasons stated in a companion decision on an AOA strike, the Board deducted from TWA's subsidy need the $1,003,000 additional revenue TWA would have received if no strike had occurred [112, 464]. TWA moved for reconsideration, proffering evidence that the navigators' strike was illegal [396]. The Board denied reconsideration, saying that the "proffered evidence . . . would not affect our conclusion on the issue" [464].

2. Then the Board decided the offset issues, relating to TWA's domestic operations. One concerned TWA's accrual of $2,990,123 reserves for deferred taxes resulting from taking statutory "accelerated amortization" for emergency facilities certified "as necessary in the interest of national defense" during the Korean hostilities (68A Stat. 52, 26 U. S. C. §168). By a 3 to 2 vote—the deciding vote being cast by the Board's then Chairman, who had

previously acted as counsel for a TWA adversary herein [443]—the Board ruled against TWA on that issue.

3. Both TWA and AOA petitioned for review.

Without deciding the merits, the entire TWA case was remanded for further proceedings because the Board's Chairman should not have participated in the decision. *Trans World Airlines, Inc.* v. *Civil Aeronautics Board,* 102 U.S.App.D.C. 391, 254 F.2d 90 (1958).

Concurrently the AOA case was remanded because the Board had erroneously disallowed strike "losses" without finding that the strike would not have occurred under honest, efficient and economical management. *American Overseas Airlines, Inc.* v. *Civil Aeronautics Board,* 103 U.S.App.D.C. 41, 254 F.2d 744 (1958).

The Later Proceedings

1. Further hearings were then held on certain issues.

On the "accelerated amortization" issue, the Examiner held for TWA. The Board reversed by a 3 to 2 vote [776, 795].

The Examiner thought TWA should be allowed only a third of its losses during the illegal 1953 navigators' strike [828, 835]. By a divided vote, the Board agreed [753].

2. The Board's final decision had the following effect.

(a) Considering only the transatlantic operations, TWA was entitled to $1,740,000 more mail pay than it had received under the temporary rate for the review period of almost eight years [850]. (TWA contends that amount is too low.)

(b) But the Board thought TWA had "excess" domestic earnings of $2,859,000 to offset during the same period [850]. (TWA contends it had no "excess" domestic earnings.)

(c) Hence the Board concluded TWA had been overpaid $1,119,000 [850].[4]

(d) Since the Board figured that TWA would save income taxes equalling 48% of whatever it had to repay the Government, it ordered TWA to repay $2,152,000 so it would be out of pocket $1,119,000 [850].[5]

3. TWA petitioned again for review. Over a year and a half after hearing argument the Court of Appeals affirmed.

With this brief resume of the background, we turn to the specific issues raised here.[6]

I. The Accelerated Amortization Issue

This issue involves the failure properly to accommodate the policies of the accelerated amortization tax statute and §406(b) of the Act, thereby frustrating Congress' defense policy in the tax statute. It also involves a misconstruction of *Delta Air Lines, Inc.* v. *Summerfield,* 347 U. S. 74 (1954).

A. The Accelerated Amortization Statute

During the Korean hostilities, Congress enacted a statute (formerly §124A of the Internal Revenue Code of 1939; now 26 U. S. C. §168) "to encourage the expansion of defense facilities with private rather than public funds" [1204c].[7]

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[4] The $1,119,000 is the difference between the $2,859,000 and the $1,740,000. All figures given thus far were computed without regard to tax credits.

[5] The $2,152,000 is the sum of $1,119,000 and $1,033,000, which is 48% of $2,152,000.

[6] The Court of Appeals' opinion discussed eight specific issues. Four of them are raised here.

[7] It was patterned on a World War II statute (54 Stat. 998, 999) *United States* v. *Allen-Bradley Co.,* 352 U. S. 306, 310 (1957).

New facilities could be "certified as necessary in the interest of national defense during the emergency period." 68A Stat. 52, 26 U. S. C. §168. The holder of a necessity certificate was given the right to amortize the certified facilities, for income tax purposes, over five years instead of their normal life.

By taking accelerated amortization, a taxpayer acquiring emergency defense facilities would pay less than normal income taxes for five years. During those years, he used up the tax depreciation allowance for the facilities, so his tax payments thereafter were greater than if he had taken normal depreciation.[8] Over the facilities' life, his total income taxes would ordinarily remain the same. Accordingly, the accelerated amortization statute did not contemplate a forgiveness of taxes but only their deferment.[9]

Taking accelerated amortization, however, gave the taxpayer one real advantage. During the first five years, he could use the amount of the deferred taxes in his business instead of paying the money to the Government. For that period, therefore, he got the practical equivalent of an interest-free loan of the deferred taxes [1308], as

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[8] The "allowance for depreciation will be eaten up, so to speak, during five years" and thereafter "taxable income will be higher." *Boone County Rural Electric Membership Corp.* v. *Public Service Comm.*, 239 Ind. 525, 536, 159 N. E. 2d 121, 126 (1959). "After the facilities have been fully depreciated under the accelerated amortization plan, income taxes will normally be greater, since no further deductions for depreciation will be possible." *City of Detroit* v. *Federal Power Comm.*, 97 U. S. App. D. C. 260, 271, 230 F. 2d 810, 821 (1955), cert. den. 352 U. S. 829 (1956).

[9] "Congress intended by section 124A only to defer tax liability." *City of Detroit* v. *Federal Power Comm.*, 97 U. S. App. D. C. 260, 271, 230 F. 2d 810, 821 (1955) cert. den. 352 U. S. 829 (1956); "over the years there is no tax savings nor tax forgiveness; but merely a deferment in taxes." *Board of Supervisors of Arlington County* v. *Virginia Electric & Power Co.*, 196 Va. 1102, 1123, 87 S. E. 2d 139, 151 (1955).

the Board has noted (*infra*, p. 22). That was the prime incentive held out by Congress to invest in emergency facilities.

B. TWA's Investment in Emergency Facilities and Taking of Accelerated Amortization

The benefit of the accelerated amortization statute was extended to all taxpayers, whether eligible for subsidy or not. Air carriers, subsidized or not, were within the coverage of this broad defense program. The Government agencies responsible for civil air policy—including the Board—encouraged the airlines to participate in this program "designed to provide additional airlift by means of a tax incentive for the acquisition of new equipment by the civil air carriers." *Annual Report to the President by the Air Coordinating Committee, 1952* [1197]; see also, *Annual Report of the Civil Aeronautics Board, 1952*, p. 30.

From 1950 to 1953, TWA acquired, for its domestic division, aircraft and other facilities for which certificates of necessity were duly issued [1308]. The Board assisted in the issuance of the certificates [1197-1198].

Only normal depreciation was taken on those facilities for book purposes [1310]. When paying income taxes, TWA exercised its statutory right to take accelerated amortization on the facilities. It thereby deferred $2,990,123 in 1951-1953 income taxes [402].

Since payment of those taxes was only deferred, TWA accrued to a reserve and charged to expense an amount equal to the deferred taxes [1309-1312].[10] Indisputably this was sound accounting practice [869-880, 1310].

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[10] The reserve was actually somewhat smaller because based on an anticipated 50% tax rate. The 52% rate then in effect, however, did not drop to 50% for several years [998; see also, 26 U. S. C. §11].

C. The Board's Decision Deprived TWA of the Statutory Benefit of Accelerated Amortization

The Board's majority treated the $2,990,123 accrued to meet TWA's deferred tax obligations as "excess" domestic earnings available to offset the transatlantic mail pay which would otherwise be due. It admitted that TWA would "not fully realize the benefits of rapid amortization" under its ruling [781]. *Actually the Board's decision deprived TWA completely of the statutory benefit and left TWA far worse off than if it had never exercised its statutory right to take accelerated amortization.*

1. The Board first determined how much money TWA needed as transatlantic mail pay [199]. We shall call the difference between that amount, and what TWA had already been paid, X.

2. X was subject to "offset" by any "excess" earnings of TWA's domestic division [51].

3. Eventually the Board held that TWA had $2,859,000 "excess" domestic earnings available to offset or reduce X [850].

4. If TWA had not exercised its statutory right to take accelerated amortization, it would have had *no* "excess" domestic earnings available to reduce X.

(a) Taking normal depreciation, TWA would have paid —as the Board admitted [775]—$2,990,123 more in 1951-1953 Federal income taxes than it actually paid. Unquestionably those additional taxes would have been a recognized expense of its domestic operations [782].

(b) Additional domestic expense of $2,990,123 would have wiped out TWA's supposed domestic "excess" of $2,859,000.

5. Under the Board's decision, therefore, TWA lost $2,859,000 in mail pay by exercising its statutory right to take accelerated amortization.[11]

6. By lopping $2,859,000 off TWA's mail pay, the Board effectively eliminated the statutory benefit which Congress extended to induce TWA to acquire emergency defense facilities—the interest-free use of the amount of the deferred taxes, which is much less than $2,859,000.

The Board's decision wholly deprived TWA of the benefit of the accelerated amortization statute. As defense authorities have noted, it runs contrary to the policy of that statute.[12]

D. The Decision Below

The Court of Appeals talked as if TWA sought "a cumulation of benefits". (App. C, p. C36). That is not the fact. TWA objects to a Board decision which left it millions of dollars *worse off* than if it had never exercised its statutory right to take accelerated amortization.[13] That result

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[11] Moreover, it must pay the deferred taxes. At the time of the Board's decision, TWA had not paid out the full $2,990,123. It paid $2,657,000 in 1954, 1955, 1959 and 1960 [1314]. Because of 1961 losses, some but not all of that amount was temporarily recovered by tax loss carrybacks [1314]. The record was closed in 1962 and hence does not show the full situation since then, but the whole amount of the increased taxes will have to be paid [1314]. Moreover, were any part not paid, a stipulation would prevent any possible windfall to TWA [409-411].

[12] The Director of the Office of Defense Management pointed out the "danger to the defense mobilization program which could result from the Board's adoption" of the conclusion that it ultimately reached [605]. The Assistant Secretary of Defense echoed his views [607-608].

[13] If the Court of Appeals supposed "a cumulation of benefits" would result because the Board awards subsidy to enable air carriers to acquire capital equipment it was also in error. Repeatedly the Board has held—as it did in this very proceeding [645]—that "the Board has no warrant from Congress under section 406 to supply these carriers with capital funds from subsidy." *Transatlantic Final Mail-Rate Case, Reopened*, 23 C. A. B. 307, 328 (1956); see also, *e.g.*, *American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323, 333 (1942); *Delta Air Corp., Mail Rates*, 4 C. A. B. 501, 502-503 (1943); *Capital Gains Proceeding*, 27 C. A. B. 79, 82-86 (1958); *United-Capital Merger Case*, 33 C. A. B. 307, 311 n. 25 (1961).

vitiates the defense policy of the tax statute (*infra*, pp. 22-23, 27-28).

In addition, the Court of Appeals said: "TWA's plight was in no way induced by any commitment of the Board, and the Board does not have the option to decline to carry out the implications of the *Delta* decision."[14] But *Delta* had nothing whatever to do with accelerated amortization and its "implications" in no wise dictated the plight which the Board's decision created (*infra*, pp. 26-27). This misreading of *Delta* should be corrected by this court.

II. The 1946 Tax Refund Issue

The Board decided this issue by violating the settled principle that in administrative proceedings, as in litigation generally, a person "cannot blow hot and cold . . ." *Callanan Road Improvement Co.* v. *United States*, 345 U. S. 507, 513 (1953).

A. How the Issue Arose

To see if TWA had "excess" domestic income, the Board determined its 1946 domestic loss. The reported 1946 loss was over $11,000,000. After various accounting adjustments, the Board disallowed certain 1946 expenditures on policy grounds, and then others on the theory that the 1946 loss would have been lower under honest, efficient and economical management [595]. Ultimately it disallowed $1,193,000 of TWA's 1946 domestic expenditures, reducing the reported loss by that amount [594].

A complication arose at this point. In 1944 and 1945, TWA had made profits and paid Federal income taxes.[15]

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[14] *Delta Air Lines, Inc.* v. *Summerfield*, 347 U. S. 74 (1954).

[15] The taxes were not paid out of subsidy. In 1944 and 1945, TWA conducted only domestic operations, which were on a service rate. *Transcontinental & Western Air, Inc., Mail Rates*, 4 C. A. B. 139 (1943), 6 C. A. B. 595 (1945).

Its reported loss of over $11,000,000 in 1946, however, resulted in a substantial "net operating loss carry-back for each of the two preceding taxable years" under §122(b)(1) of the Internal Revenue Code of 1939 (53 Stat. 867, as amended, 56 Stat. 807, 844, 847-848). Consequently TWA received in 1946 a $3,016,000 refund of taxes previously paid.

Of the 1946 refund, roughly $450,000 was received only because the tax authorities recognized, for tax purposes, the $1,193,000 actual expenditures which the Board disallowed for rate purposes.[16] The disallowed items increased the 1946 tax loss, and thus the loss carry-back, and thus the tax refund.

B. The Board's Inconsistent Logic

The Board first decided that the refund in 1946 of taxes paid previously could be used to reduce TWA's 1946 net loss. (That phase of its decision is not in issue here.) It then went much further. In practical effect, it reduced TWA's reported 1946 domestic loss (and hence increased its domestic "excess" for the review period) by the *entire* 1946 tax refund [629-630].

Accepting the Board's hypothesis that an efficient, economical management would not have incurred the $1,193,000 disallowed expenditures, it is easy to compute TWA's net 1946 loss. TWA would have spent $1,193,000 less in 1946 and hence its 1946 tax loss would have been $1,193,000 lower. Its loss carry-back would have been lower and its tax refund would have been $450,000 smaller. Under the assumed management, therefore, TWA's net 1946 domestic loss would have been $743,000 ($1,193,000 minus $450,000) lower than reported.

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[16] The $450,000 figure is disputed. The Board thinks the figure is $129,000.

Consequently the Board should have reduced the reported 1946 loss, by reason of the disallowed expenditures, $743,000 net.[17] Instead it reduced that loss by $1,193,000 net. It ended with a fantastic airline that hypothetically made no such expenditures yet marvelously received a tax refund because they actually were made.

Admitting that "TWA's contention is not without force" (App. C, p. C38), the court thought the Board's conclusion somehow followed from an earlier "actual tax" case which is clearly distinguishable (*infra*, pp. 31-33). The inequitable result reached below patently distorts the Act's scheme.

III. The "Termination Indemnities" Issue

As the Court of Appeals said, this issue is "large in significance, for its proper disposition requires attentive consideration to fundamentals" (App. C, p. C17). But the Board completely negated the Act's subsidy policy by holding that a carrier's recognized expenses are less in subsidy than non-subsidy cases.

A. The Legal Liability to Pay "Termination Indemnities"

Employers in this country make social security and unemployment compensation contributions to the Government, which pays benefits to employees. Another system is followed in Italy and other countries where TWA employs foreign nationals [1086]. There the employer pays benefits directly to the employees when they retire or leave its service [1089-1090]. The benefits, called "termination indemnities," are based on length of service [1086]. Every foreign national leaving TWA's employ,

[17] This could have been done several ways. The simplest method would be to allocate $450,000 of the tax refund to the disallowed expenditures.

after a given minimum period, is legally entitled to such benefits, with very rare exceptions.[18]

Realistically, the total compensation which TWA must pay each foreign employee for his services in any year consists of (a) the wages currently paid in that year, plus (b) the indemnity paid thereafter based on the service rendered in that year [1087-1088].

Faced with an unquestioned legal liability to pay these indemnities, TWA started a reserve for them [921]. The reserve reflects "accruals actually due for the past period" [922], adjusted annually to eliminate accruals for the exceptional cases of persons forfeiting benefits [1089]. Sound accounting practice required this reserve [923, 1093-1094].

B. The Board's Decision

To decide what TWA should be paid for carrying the mail, the Board had to determine the expenses TWA had incurred in performing that service.

The Examiner concluded that TWA's accruals to the reserve for termination indemnities were "similar to a retirement or unemployment contribution by the employer. To avoid distortion of current costs these must be spread over the period of employment rather than entered in a lump sum at the time paid out" [35]. He held the accruals "properly chargeable to expense, both in principle and in amount, for mail rate purposes" [35].

Mistakenly analogizing the accruals to reserves for merely contingent liabilities, the Board disallowed them [109-110].[19] The effect was to understate TWA's expenses during the review period by over $350,000.

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[18] The only exceptions are persons discharged for criminal acts and hourly employees who quit [35, 1086].

[19] TWA's obligation to make termination payments is not contingent, but definitely and presently fixed by the foreign statutes [1087-1090, 1092-1093].

IV. The Illegal Navigators' Strike Issue

The Board's decision on this issue raises major legal questions on both the accommodation of the labor policy of the Railway Labor Act to the Act's subsidy policy, and the proper administration of §406 of the Act. Those questions are highlighted by the Board's decision that TWA unduly prolonged the illegal strike.[20]

A. The Union's No-Strike Covenant

TWA used navigators only on international flights. To save money, it planned to dispense with them as suitable radio facilities were developed [1325-1326]. An agreement with the navigators' union ("ALNA") reached late in 1952 recognized that TWA intended to discontinue using navigators [1327-1328].

This agreement—which was in effect when ALNA called the July 1953 strike [1039-1040]—contained elaborate provisions for submitting disputes to a System Board of Adjustment under the Railway Labor Act [1213], which applies to air carriers.[21] It also provided "that during the term of this Agreement the Company will not lock out any employee covered hereby and *the Union will not authorize or take part in any strike or picketing of Company premises until the procedures for settling disputes as provided herein and as provided by the Railway Labor Act have been exhausted*" [1213].

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[20] The Board was sharply divided on the strike issue. One member voted for TWA in all respects [798] and two against it in all respects [794]. The deciding votes were cast by two members who concluded that the first four days of the strike were not due to "any lack of honest, economical and efficient management on the part of TWA" [748], but expressed reservations about the pre-strike period which affected their decision to attribute two-thirds of the strike costs to TWA [751-752]. The reservations were unwarranted, but to focus attention on the major legal questions we shall not discuss them at this juncture.

[21] 49 Stat. 1189, 45 U. S. C. §181 ff.; *International Assn. of Machinists, AFL-CIO* v. *Central Airlines Inc.*, 372 U. S. 682, 685 (1963).

B. The Illegal Strike

After investigation, the Civil Aeronautics Administration decided TWA no longer needed navigators on flights between Paris and Rome [1244-1248]. In June 1953, it gave TWA final approval to discontinue navigators on such flights [1251-1252]. ALNA claimed the discontinuance would violate the contract [1265].

The union's counsel warned ALNA's executive committee that a strike would violate the contract [1040], and "the International Union could not approve or authorize a strike" [1038]. But the committee disregarded his advice to invoke "the grievance machinery" [1050; see also, 1039]. On the night of July 9, 1953, it called a strike [1051-1052].

At noon on July 10, 1953, ALNA began picketing TWA [1330]. The strike violated the Railway Labor Act and the contract [1040, 1237]. Thereafter TWA discharged each navigator who refused to accept flight duty [1064, 1268-1271].

C. The Meetings in the First Few Days of the Strike

Later we shall note the reasons which the Board gave for agreeing "with the examiner" that the strike "was unnecessarily prolonged by TWA's intransigeance" [752]. Evidently the court was not persuaded by them; instead, it referred to TWA's supposed "rebuff of the efforts of federal mediators to bring the parties together" and "its refusal for some time to talk with any union official" (App. C, p. C29). The actual facts are illuminating.

On July 11, 1953, the day after the strike, a member of the National Mediation Board met separately with TWA and ALNA, a frequent practice [1070]. At his instance, TWA's vice-president of industrial relations met the next

two days with ALNA's attorney [1065, 1353, 1354], who "represented the International Transport Workers Union and substantially all of its local unions" including the "navigators group" [1026, 1027], and "negotiated" the navigators' "contracts with TWA" [1027]. ALNA's attorney said these meetings were held on a "personal" basis [1065, 1353]. However labelled, the meetings were undoubtedly held.

The Examiner, with whom the Board agreed, summed up the situation clearly [826]:

> "After the strike occurred TWA refused to deal directly with union officials until the navigators returned to work. The navigators would not return to work until TWA would agree to reinstate the discharged navigators. *TWA did meet indirectly with the union on July 11 through a mediator and had direct discussions with the union's counsel (not an official of the union) on July 12 and 13.* However, since it was adamant in its refusal to reinstate the discharged navigators and the union was equally adamant about returning to work without a reinstatement of the discharged navigators, the discussions broke off."

D. The Union's Rejection of Mediation

TWA tried to get ALNA to comply with the Railway Labor Act and honor its no-strike agreement by calling off the illegal strike. ALNA refused unless TWA unconditionally reinstated the discharged navigators [1353].

The mediator then suggested a compromise, which the Board completely ignored. On July 13, 1953, he proposed that the navigators return to work and accept mediation [1273-1274]. ALNA flatly rejected the proposal [1066]. It did not want either mediation or arbitration [1073].

ALNA feared that it "would have no bargaining power" once the strike ended [1073]. "Once they are out on

strike and go back, the likelihood of them going back as a group . . . is not very great" [1075]. In plain English, ALNA wanted to use the illegal strike to force concessions from TWA. In that purpose, it succeeded.

E. The Settlement of the Strike

Mediation talks resumed on July 19, 1963. After two days of work, an agreement was reached and ratified on July 21 [1070, 1237-1241].

The unlawful strike, which the Board thought "obviously a failure from the start,"[22] had its effect on TWA. It prevented 75% of TWA's transatlantic flights[23] and inflicted damage of over $1,000,000 on TWA in less than two weeks [828].

By the settlement agreement, TWA made concessions. It took back the discharged navigators, but with a "penalty" amounting to "$200 or $300 or $400 apiece" in addition to "a loss of earnings" [1071, 1076, 1077, 1239-1240]. It also waived damages [1240]. ALNA admitted the strike was illegal [1077, 1237]. It also conceded the point leading to the strike by recognizing TWA's "inherent right to discontinue the use of navigators" [1071-1072, 1238].

F. The Board's Theory

The Board theorized [752]:

> "ALNA's request for reinstatement of the discharged navigators was not an unreasonable one, even though the strike itself was illegal; TWA in fact acceded to this request in the ultimate settlement of the strike. As the examiner found, if

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[22] It also said that "within a very short time after the walkout, the navigators realized its futility" [752]. Whatever the navigators' private belief may have been, it was not communicated to TWA at the time.

[23] Inadvertently omitted from the Joint Appendix below was the page (Ex. T-810, p. 70) supporting that statement.

> TWA had not so long continued to insist on what amounted to unconditional surrender on the union's part, it could have achieved precisely the settlement it ultimately did at the cost of a substantially shorter strike."

1. *The Non-Existent Demand for "Unconditional Surrender."* Unconditional surrender involves submission to a victor's unilateral terms. TWA asked instead that ALNA comply with the law, call off the illegal strike, and have an impartial tribunal resolve any remaining issue.

2. *The Speculation That TWA Would Have Gotten the Same Results by Capitulating Earlier.* Even at the end, when the navigators were sobered by their growing loss of income, ALNA balked at an unqualified admission of TWA's "inherent rights" to stop using navigators [1071]. It is highly doubtful this admission would have been made earlier.[24]

The main point, however, goes deeper. Early capitulation to ALNA might conceivably have ended this particular strike sooner. But the issue transcended the immediate controversy. It concerned TWA's relations with ALNA for years to come. Meek acquiescence in ALNA's power to call—and end—an illegal strike on its own terms, with practical immunity, would have created a dangerous precedent inviting several future strikes. Resistance might entail more initial loss but avoid far more severe injury in the long run.

TWA decided to resist ALNA's illegal duress as long as it could. The sequel is significant. After the strike, TWA followed "the same general policy" as before in

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[24] Belittling the admission, the Board said a "1952 collective bargaining agreement had already established TWA's right to eliminate navigators" [752]. Yet that very issue had led to the strike [1265]. ALNA claimed it had never admitted any such right [1077].

dealing with ALNA [1025]. Yet ALNA never struck TWA again [1054, 1332].

3. *The Reliance on Concessions Wrung by Unlawful Economic Pressure as Evidence of TWA's Imprudence.* The Board said "ALNA's request for reinstatement of the discharged navigators was not an unreasonable one, even though the strike itself was illegal; TWA in fact acceded to this request in the ultimate settlement of the strike" [752].[25] TWA was eminently reasonable in asking that ALNA abide by the law and not prosecute an unlawful strike to enforce its "request." Apart from that, a concession made under illegal duress may not properly be used to show it was imprudent to resist the duress (*infra*, p. 42).

In like vein, the Board argued that TWA's "failure to seek damages from the union was inconsistent with its own professed justification for its rigid attitude during the strike" [753]. Of course TWA waived damages by the settlement agreement [1240]. But waiving a claimed right to settle a dispute is not inconsistent with the claim of right. Certainly a waiver extracted by unlawful duress cannot be utilized to establish the supposed inconsistency (*infra*, p. 42).[26]

G. The Board's Decision

The Examiner agreed TWA's position after the strike "had strong moral and legal justification" [1364], but

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[25] Actually ALNA asked for unconditional reinstatement of the discharged navigators before the strike ended [1353]; under the settlement, TWA took them back after the strike ended, and only "with a penalty" and "a loss of earnings" [1071, 1076, 1077, 1239-1240].

[26] Similarly, the Board said the strike "was obviously a failure from the start, as the settlement agreement acknowledged" [752]. Actually the agreement contained no such acknowledgment. Had it done so, however, the Board could not properly use the acknowledgment to TWA's disadvantage.

recommended allowing only one-third of TWA's total strike losses of $1,033,000.

Although the Board was sharply divided on the issue, the majority voted to sustain the Examiner's ultimate conclusion (*supra*, p. 15 n. 20). In net effect, it found TWA inefficient and uneconomical because it continued to try to get ALNA to obey the law.

Reasons for Allowing the Writ

This case raises important questions as to the proper construction of the Act's rate section and erroneous applications of this court's decisions [27] interpreting its subsidy provision.[28] Also involved are issues on the proper accommodation of statutes, since the Board frustrated both Congress' defense policy in the accelerated amortization statute and its labor policy in the Railway Labor Act.

I. The Accelerated Amortization Issue

This issue raises the important "problem of accommodation" of two statutes; the decision under the Act frustrated the accelerated amortization law, "not only a more recent but a more specific expression of policy." *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 79 (1944).

The "policies of" the two statutes "necessarily must be accommodated, one to the other," *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 172 (1962), "so that the obvious purpose in the enactment of each is preserved." *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana Rd. Co.*, 353 U. S. 30, 40 (1957). An

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[27] *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board*, 336 U. S. 601 (1949); *Western Air Lines, Inc.* v. *Civil Aeronautics Board*, 347 U. S. 67 (1954); *Delta Air Lines, Inc.* v. *Summerfield*, 347 U. S. 74 (1954).

[28] In the fiscal year 1966, the Board allotted subsidies amounting to $74,100,000 to 23 subsidized carriers. *Annual Report of the Civil Aeronautics Board, 1966*, pp. 35, 64.

agency administering a rate statute must harmonize it with a tax law so that there will be "no frustration of the tax laws inherent in [its] action." *Federal Power Comm.* v. *United Gas Pipe Line Co.*, 386 U. S. 237, 246 (1967).[29]

Here the Board frustrated the policy of the accelerated amortization statute—which for brevity we shall sometimes call §168—by failing to follow the recognized procedure for harmonizing it with rate statutes.

A. *The Board's Frustration of the Policy Underlying the Accelerated Amortization Statute.* Congress enacted §168 "to encourage construction in the interest of national defense." *City of Detroit* v. *Federal Power Comm.*, 97 U. S. App. D. C. 260, 271, 230 F. 2d 810, 821 (1955), cert. den. 352 U. S. 829 (1956). To that end, as noted (*supra*, p. 8), it held out the incentive of a temporary deferment of taxes amounting "to an interest-free loan in the earlier years of the service life of assets to be repaid in later years." *General Passenger-Fare Investigation*, 32 C. A. B. 291, 327 (1960).

Congress did not try to persuade people to invest in emergency facilities by saying: "Acquire the facilities and you may temporarily defer $2,990,000 of taxes (which you must expect to pay later) by accelerating depreciation for five years. If you so elect, however, you will lose an additional $2,859,000 that you would have received."

Such a proposal would have given the taxpayer only an illusory right to accelerate amortization. Far from

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[29] See also, *e.g.*, *United Mine Workers of America* v. *Pennington*, 381 U. S. 657, 665 (1965); *Seaboard Air Line Rd. Co.* v. *United States*, 382 U. S. 154, 156 (1965); *Carnation Co.* v. *Pacific Westbound Conference*, 383 U. S. 213, 218 (1966); *Denver & Rio Grande Western Rd. Co.* v. *United States*, 387 U. S. 485, 494-495 (1967).

getting the free use of the deferred taxes, he would have to pay a fabulous rate of interest. No such proposal would induce any taxpayer to acquire defense facilities.

Yet the Board's decision retroactively converted the tax statute into just such a delusion. TWA was able to accelerate amortization only by losing $2,859,000 in mail pay. It was left worse off than if it had never taken accelerated amortization (*supra*, pp. 9-10). Congress held out a benefit to TWA but the Board nullified it by refusing to follow the course theretofore adopted to accommodate the policy of §168 with the policy underlying rate statutes.

B. *The Board Departed From the Recognized Method of Accommodating the Policies of the Accelerated Amortization Statute and Rate Statutes.* Prior decisions rejected the Board's approach here.

1. *The Basic Test of "Need."* The Act provides for such "rates as the 'need' of the air carrier makes appropriate. But such a standard has its counterparts in other legislation dealing with rate-making . . ." *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board*, 336 U. S. 601, 604 (1949). Rate statutes generally are designed to produce rates no higher than the utility needs.

For instance, the Natural Gas Act envisages a rate which will be "the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." *Atlantic Refining Co.* v. *Public Service Comm.*, 360 U. S. 378, 388 (1959). The Commission "must see to it" that any requested increase "is in fact needed, and is no more than is needed, for the purpose." *City of Detroit* v. *Federal Power Comm.*, 97 U. S. App. D. C. 260, 267, 230 F. 2d 810, 817 (1955), cert. den. 352 U. S. 829 (1956).[30]

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[30] *Panhandle Eastern Pipe Line Co.* v. *Federal Power Comm.*, 115 U. S. App. D. C. 8, 12, 316 F. 2d 659, 663 (1963), cert. den. 375 U. S. 881 (1963), also noted that natural gas rates are limited by need.

2. *The "Actual Tax" Policy.* A utility needs to pay its taxes but not taxes it will not have to pay. Usually, therefore, rates are based only on taxes actually paid.

Thus, under the Natural Gas Act, a rate is not based on "hypothetical tax expense." *Federal Power Comm.* v. *United Gas Pipe Line Co.*, 386 U. S. 237, 244 (1967). Whatever "federal income taxes were actually paid" are "treated as part of the cost of service . . . No theoretical amount not actually paid can be so included." *El Paso Natural Gas Co.* v. *Federal Power Comm.*, 281 F. 2d 567, 573 (5 Cir. 1960), cert. den. 366 U. S. 912 (1961).

The Board has the same general "actual tax" policy. It will not allow an "amount for income taxes which has not been, and will apparently not be, disbursed . . ." *Western Air Lines, Inc., et al., Mail Rates*, 14 C. A. B. 201, 251 (1950), affd. on this point in *Summerfield* v. *Civil Aeronautics Board*, 92 U. S. App. D. C. 248, 207 F. 2d 200 (1953).[31]

3. *Accommodation of §168 and Rate Statutes by Tax "Normalization."* The problem arose how to reconcile the policy of §168 with the actual tax policy of rate statutes.[32] Taking accelerated amortization under §168 reduced income taxes, and therefore expenses, during the first five years. Viewing that period alone, a "saving" of taxes resulted. By mechanical application of the actual tax policy, rates for that period would be reduced to reflect the "saving" of expenses.

That mechanical logic, however, distorted Congress' scheme and thwarted its purpose in enacting §168. Congress did not view the first five years in isolation. It was dealing with a unitary whole—the entire life of the emer-

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[31] This court did not pass on the point when it affirmed in *Western Air Lines, Inc.* v. *Civil Aeronautics Board*, 347 U. S. 67 (1954).

[32] Plainly the question is not whether there has been an "implied repeal" (App. C, p. C36) of that policy.

gency facilities. "Any concept which treats such an unusual tax reduction as a 'saving' to belong solely to the five years allowed, is totally out of touch with reality." *Boone County Rural Electric Membership Corp.* v. *Public Service Comm.*, 239 Ind. 525, 536, 159 N. E. 2d 121, 126 (1959). Repeatedly, therefore, courts and administrative agencies held that rates should not be lowered to reflect the temporary tax "saving" during the initial five years. Instead income tax expense was "normalized," with income taxes computed for rate-making purposes as if accelerated amortization had not been taken.

This practical way of harmonizing the policy of §168 with the actual tax policy of rate statutes was adopted early under the Natural Gas Act. *Matter of Treatment of Federal Income Taxes as Affected by Accelerated Amortization*, 12 F. P. C. 369 (1953).[33] It was sustained in *City of Detroit* v. *Federal Power Comm.*, 97 U. S. App. D. C. 260, 272, 230 F. 2d 810, 822 (1955), cert. den. 352 U. S. 829 (1956): "Unless this is permitted, it is difficult to see how Panhandle [the utility] could benefit substantially from section 124A [now §168]."

"Normalization" still obtains under the Natural Gas Act when accelerated amortization is taken under §168.[34]

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[33] The Commission went even further there. As pointed out in *Panhandle Eastern Pipe Line Co.* v. *Federal Power Comm.*, 115 U. S. App. D. C. 8, 10, 316 F. 2d 659, 661 (1963), cert. den. 375 U. S. 881 (1963), it also permitted the utility "to include reserves for deferred taxes in its rate base." No question arises here whether that further holding was sound, since TWA proposed no such addition to the rate base.

[34] At one time, the Commission also permitted normalization when liberalized depreciation was taken under §167 of the Internal Revenue Code, even though that statute does not have the limited purpose or effect of §168 and applies generally to all property for the indefinite future. The Commission no longer permits normalization where §167 is concerned, *Alabama-Tennessee Natural Gas Co.* v. *Federal Power Comm.*, 359 F. 2d 318 (5 Cir. 1966), cert. den. 385 U. S. 847 (1966), but still normalizes taxes when accelerated amortization is taken under §168. *Southwestern Public Service Co.*, 33 F. P. C. 343, 355, 380-382 (1965). No question arises here under §167.

Taxes are also "normalized" under other rate statutes to reconcile the purpose of §168 with the actual tax policy.[35]

4. *The Board's Approval of §168 "Normalization" in Non-Subsidy Rate Cases.* When subsidy rates are not involved, the Board holds taxes should be "normalized" to effectuate the policy of §168. To "deny the normalized taxes would be contrary to the clear intent of Congress to grant to all taxpayers what amounts to an interest-free loan in the earlier years of the service life of assets to be repaid in later years." *General Passenger-Fare Investigation,* 32 C. A. B. 291, 326 (1960), adhered to recently in *Domestic Service Mail Rate Investigation,* Order E-25610 (Aug. 28, 1967).[36]

5. *The Subsidy Argument.* Frustration of Congress' "clear intent" in enacting §168 is not justified because a subsidy is involved.

(a) Suggesting that "TWA's plight" was due to controlling authority, the court remarked that "the Board does not have the option to decline to carry out the implications of the *Delta* decision" (App. C, p. C37). But *Delta Air Lines, Inc.* v. *Summerfield,* 347 U. S. 74 (1954), did not

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[35] *Boone County Rural Electric Membership Corp.* v. *Public Service Comm.,* 239 Ind. 525, 536, 159 N. E. 2d 121, 126 (1959); *Application of Montana-Dakota Utilities Co.,* 102 N. W. 2d 329 339-340 (N. Dak. 1960); *Calvert* v. *Houston Lighting & Power Co.,* 369 S. W. 2d 502, 509 (Tex. Civ. App. 1963), writ of error refused; *Board of Supervisors of Arlington County* v. *Virginia Electric & Power Co.,* 196 Va. 1102, 1123, 87 S. E. 2d 139, 151 (1955).

[36] In the *General Passenger-Fare* opinion, the Board quoted approvingly (32 C. A. B., at p. 327) from the leading §168 "normalization" case under the Natural Gas Act, *City of Detroit* v. *Federal Power Comm.,* 97 U. S. App. D. C. 260, 230 F. 2d 810 (1955) cert. den. 352 U. S. 829 (1956). In its *Domestic Service Mail Rate* opinion, the Board adopted (p. 3) "the rationale of the Examiner" as set forth in Appendix C thereto (pp. 24-25), including the portion adhering to the *General Passenger-Fare* decision.

involve §168 or any issue of accommodating its policy with the Act. Nor did it remotely suggest that the Board may leave a carrier exercising the right conferred by §168 financially *worse off* than it would otherwise have been.

Delta held—which no one disputes here—that "the return in form of a subsidy must be computed with reference to the entire operations of the carrier" (p. 79). This court ruled that, when Congress has stated one policy in the Act, the Board may not adopt a different policy expressed in no statute (pp. 79-80). Here the problem is very different. Congress stated a general policy in the Act and a specific policy in §168. The question how to harmonize those policies did not even arise in *Delta*.

(b) As summarized in *Delta*, the Act's general subsidy policy is that "subsidy may not exceed" the "carrier's 'need'" which "is an amount which, 'together with all other revenue' of the carrier, will enable it to meet and maintain the objectives of the Act" (347 U. S., at p. 79). The Act's objectives include development of "the national defense" (52 Stat. 998, 49 U. S. C. §486(b)).[37] The specific objective of §168 was to develop national defense (*supra*, pp. 6-7). Harmonization of the statutory policies is therefore even easier than under rate statutes, like the Natural Gas Act, without an express national defense objective.

By §168, Congress held out one benefit to induce people to invest in defense facilities—for a limited period, they did not have to turn over to the Government an amount of money which they could use in their business. In Congress' view, they needed that amount to develop national defense in the desired way. Yet here the Board required TWA to turn over that amount to the Government and deprived TWA of the free use of the funds which Congress believed

[37] See also, §2(a) and (d), 52 Stat. 980, 49 U. S. C. §402(a) and (d).

were needed to develop national defense. The Board thus frustrated the defense objective of §168.

(c) In a subsidy case, the Board is doubtless "not arbitrating between private economic interests" (App. C, p. C34). Neither is it so "arbitrating," however, when it fixes a service mail rate.[38] Yet it "normalizes" taxes then, to preserve the broad defense policy of §168. *Domestic Service Mail Rate Investigation, supra,* p. 26 n. 36.

When Congress decided by §168 that persons investing in defense facilities could temporarily retain part of the taxes they would ordinarily have paid, the taxpayers as a group bore the resultant burden. Congress regarded that as worthwhile to achieve a paramount national defense goal beneficial to the whole country. Taking the retained money away to benefit taxpayers as a group defeats Congress' purpose just as much as taking it away to benefit "private economic interests."

(d) Evidently the Board and the court thought it unwise to extend §168 to subsidized carriers. The court remarked "there is nothing to show that Congress intended to pile this Ossa of inducement on top of the Pelion of the incentive in the 406 subsidy . . ." (App. C, p. C36).

The metaphor appears highly inappropriate. By leaving TWA financially worse off than if it had never exercised its statutory right under §168, the Board not only removed "Ossa" but also levelled "Pelion."[39] Apart from that, the argument is quite unsound.

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[38] Likewise, whenever the Board fixes a mail rate—service or subsidy—its "primary duty" is to pay out no more "than is currently needed to accomplish the purposes of Section 406" (App. C, p. C34).

[39] One could readily prevent TWA from getting a benefit from §168 while it was receiving subsidy by deducting from its $2,990,123 reserve for deferred taxes the amount of the benefit derived from §168, *i.e.*, the value of the "interest-free loan" resulting from the deferral of those taxes. That would put TWA in the same position as if it had not taken accelerated amortization. The Board went much further, however, and treated the whole reserve as "excess" domestic income.

The legislative history is silent on the precise point. Evidently Congress did not consider it, one way or the other.[40] Since, however, the Board does not grant subsidy to enable an air carrier to acquire capital equipment (*supra*, p. 10, n. 13), Congress could well have concluded that "Ossa" would not be piled on "Pelion" in any event.

Congress might have made carriers receiving subsidy ineligible for the benefit afforded by §168 or required the amount of that benefit to be deducted from any subsidy otherwise payable. Instead of doing so, it used all-embracing language. "*Every person*, at his election, shall be entitled to a deduction with respect to the amortization . . . of any emergency facility . . ." 26 U. S. C. §168(a). There is "no justification for reading limitations, restrictions, or qualifications into the statute." *Ken-Rad Tube & Lamp Corp.* v. *Commissioner of Internal Revenue*, 180 F. 2d 940, 942 (6 Cir. 1950); see also, *Arkansas-Oklahoma Gas Co.* v. *Commissioner of Internal Revenue*, 201 F. 2d 98, 103 (8 Cir. 1953).

The agencies administering §168 clearly regarded it as covering subsidized carriers. They encouraged all airlines to participate in the defense program [1197]. Although subsidized, TWA was issued certificates of necessity [1197-1198, 1308]. This administrative construction is of great weight, *United States* v. *Allen-Bradley Co.*, 352 U. S. 306, 309-310 (1957); it confirms that §168 should be read as Congress wrote it.

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[40] Sometimes, after a specific problem has already arisen, Congress resolves it by express language, as it did with the investment tax credit discussed in *North Central Airlines, Inc.* v. *Civil Aeronautics Board*, 124 U. S. App. D. C. 251, 363 F. 2d 983 (1966), mentioned below (App. C, p. C36). Usually, however, Congress leaves the harmonization of statutes to the courts and its resolution of one particular issue does not indicate how other, different issues should be resolved.

Whether a subsidized carrier should receive the benefit of §168 was a matter of policy for Congress to decide. The Board was not at liberty to disregard Congress' policy because it preferred a different one. *Western Air Lines, Inc.* v. *Civil Aeronautics Board,* 347 U. S. 67, 73 (1954); *Delta Air Lines, Inc.* v. *Summerfield,* 347 U. S. 74, 79-80 (1954); *Civil Aeronautics Board* v. *Delta Air Lines, Inc.,* 367 U. S. 316, 322 (1961). Its decision, conflicting with prior decisions involving §168, is a serious error of federal law which this court should rectify.

II. The 1946 Tax Refund Issue

The extraordinary result below, under which a hypothetical airline not making certain expenditures nonetheless received a tax refund attributable to them (*supra,* pp. 12-13), contravened this court's settled rules.

A. *The Controlling Principles.* The Board's fallacy is patent. A hypothesis must be used consistently throughout. When hypothetical "normal" income rather than actual income is utilized, both receipts and deductions must be adjusted to conform to the same hypothesis.[41]

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[41] See, *e.g., Re Michigan Consolidated Gas Co.,* 5 PUR 3d 449, 464 (Mich. Pub. Serv. Comm. 1954)—when contributions are disallowed in fixing rates, "income tax credits resulting from such contributions" should be deducted from actual revenue; *Glenshaw Glass Co., Inc.* v. *Commissioner,* 23 T. C. 1004, 1016 (1955)—constructive income from hypothetical cancellation of contract must be offset by "increased Pennsylvania income tax on the augmented income"; *Ainsworth Mfg. Corp.* v. *Commissioner,* 23 T. C. 372, 377 (1954)—constructive income from hypothetical mill operations must be offset by hypothetical patent royalties which would have been payable; *National Grinding Wheel Co.* v. *Commissioner,* 8 T. C. 1278, 1286 (1947)—constructive income from hypothetical equipment operations must be offset by additional depreciation which would have resulted; *Lanzit Corrugated Box Co.* v. *Commissioner,* 29 T. C. 330, 339 (1957)—same; *Brown-Forman Distillers Corp.* v. *Commissioner,* 33 T. C. 87, 109 (1959)—constructive income from hypothetical whiskey sales must be offset by additional advertising expenses which would have been needed.

That follows from the familiar principle that a person "cannot blow hot and cold" in litigation. *Callanan Road Improvement Co.* v. *United States,* 345 U. S. 507, 513 (1953). Any theory utilized must be "made use of consistently, and regardless of the consequences." *West Ohio Gas Co.* v. *Public Utilities Comm. of Ohio (No. 1),* 294 U. S. 63, 71 (1935).[42]

Presumably "Congress could constitutionally have specified" otherwise in a subsidy case (App. C, p. C39), but such a "real innovation" should "have a more solid basis than" judicial "predilections." *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board,* 336 U. S. 601, 607 (1949). A statute will not be read to produce "extraordinary," "unreasonable" or "absurd" results.[43] The Act does not even purport to authorize inconsistency by the Board.

B. *The Unsound Appeal to Authority.* Nor is inconsistency sanctioned by the case cited below.[44]

No tax refund was involved there. The issue was how much extra mail pay carriers should be allowed "to cover Federal income taxes" (14 C. A. B., at p. 252). When fixing a mail rate in advance, the Board would normally

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[42] See also, *e.g., United Fuel Gas Co.* v. *Railroad Comm. of Kentucky,* 278 U. S. 300, 307-308 (1929); *Hall* v. *Federal Communications Comm.,* 99 U. S. App. D. C. 86, 94, 237 F. 2d 567, 575 (1956); *Roth* v. *McAllister Bros., Inc.,* 316 F. 2d 143, 145 (2 Cir. 1963).

[43] See, *e.g., Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.,* 305 U. S. 315, 333 (1938); *United States* v. *Brown,* 333 U. S. 18, 27 (1948); *United States* v. *Bryan,* 339 U. S. 323, 338 (1950); *Perry* v. *Commerce Loan Co.,* 383 U. S. 392, 400 (1966); *United States* v. *Cook,* 384 U. S. 257, 262 (1966); *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.,* 388 U. S. 175, 184 (1967).

[44] *Western Air Lines, Inc. and Inland Air Lines, Inc., Mail Rates,* 14 C. A. B. 201 (1950), affd. in *Summerfield* v. *Civil Aeronautics Board,* 92 U. S. App. D. C. 248, 207 F. 2d 200 (1953). This court did not pass on the issue in affirming. *Western Air Lines, Inc.* v. *Civil Aeronautics Board,* 347 U. S. 67 (1954).

allow enough extra to cover the carrier's estimated taxes. But "it developed that, due to carry-back losses and other provisions of the federal tax statutes, Western had little or no tax liability for this period" (207 F. 2d, at p. 206). The Board limited the extra amount to the taxes actually payable, to avoid "awarding the carrier an amount for income taxes which has not been, and will apparently not be, disbursed, and which must therefore be considered a windfall to the carrier" (14 C. A. B., at p. 251). In particular, it awarded no extra amount for income taxes on disallowed items, saying (14 C. A. B., at p. 253):

> "What Western and Inland are insisting on therefore is that for every dollar disallowed for ratemaking purposes—e.g., an expense incurred because of uneconomic or inefficient management—there must be returned to the carrier an amount representing Federal income taxes on that dollar even though no taxes have been, or will be, paid on the dollar. (There is normally no tax liability because the Bureau of Internal Revenue usually allows the item to be deducted for tax purposes.)" [45]

In short, the Board held that carriers should not be allowed mail pay to cover imaginary taxes, since the allowances would be "gratuities" (14 C. A. B., at p. 253).[46] That is a far cry indeed from saying that, in determining what a carrier would need under efficient, economical man-

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[45] This part of the Board's opinion was omitted from the quotation below (App. C, pp. C39-40).

[46] Far from saying carriers should be punished for having made disallowed expenses, the Board indicated the opposite: "The constructive method is thus revealed as a convenient vehicle for reimbursing carriers for substantial parts of funds disallowed by the Board in accordance with the ratemaking standards of the Act. The carriers characterize the denial of this kind of reimbursement as 'punishing' the carrier. *On the contrary, we consider such allowances gratuities which we can no longer tolerate*" (14 C. A. B., at p. 253).

agement, the Board may—as here—use inconsistent hypotheses to compute receipts and deductions.

C. *The "Public Fisc" Argument.* The court made "the point that the public fisc had already been drawn on to provide to the carrier that made excessive expenditures a (tax refund) payment" (App. C, p. C40). But TWA is not being punished for making expenditures later disallowed (*supra,* p. 32 n. 46). The only issue is what it would have earned under efficient, economical management. Since such a management would neither have made the disallowed expenditures nor received as large a tax refund, TWA's net income would have been less than the figure fixed below. No one need wear "blinders" (App. C, p. C40) to recognize that simple fact.

Here the Board ended with fantasy by proceeding on inconsistent bases. This court should review its gross misapplication of the Act.

III. The "Termination Indemnities" Issue

The decision on this significant issue violated this court's settled rule that a legitimate expense or cost incurred in one year by virtue of activities occurring then should be accrued to avoid distorting true income in that year.

A. *The Basic Statutory Provisions.* Section 406(b)(1) of the Act requires every mail rate—whether service or subsidy—to take into consideration "the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail."

1. Since mail service cannot be provided without incurring expenses, every mail rate should cover the legitimate expenses incurred. "The statute provides for actual

compensation for the service performed in carrying the mail—a so-called service rate. This is the ordinary purpose of a utility rate. It involves reimbursement for expenses incurred . . ." *Summerfield* v. *Civil Aeronautics Board,* 92 U. S. App. D. C. 248, 252, 207 F. 2d 200, 204 (1953), affd. *Western Air Lines, Inc.* v. *Civil Aeronautics Board,* 347 U. S. 67 (1954).

2. After the rate has provided for "reimbursement for expenses incurred" in carrying the mail, §406(b)(3) of the Act "*adds to* these ordinary features of a utility rate another consideration" which is "a need *beyond the requirements of fair compensation* for a service performed." *Summerfield* v. *Civil Aeronautics Board, supra.* This subsidy is "mail pay *in addition to reasonable compensation* for services rendered" to "enable the carrier to meet the objectives of the statute . . ." *Pan American Airways, Inc.* v. *Civil Aeronautics Board,* 84 U. S. App. D. C. 96, 97, 171 F. 2d 139, 140 (1948).

3. A carrier having no need for a subsidy gets only the service rate. *Western Air Lines, Inc.* v. *Civil Aeronautics Board,* 347 U. S. 67, 72 (1954). Since that rate is designed to cover expenses, however, every mail rate makes provision for the carrier's legitimate expenses in rendering mail service.

4. "Administration of these provisions requires a computation of the revenues and expenses of the carrier." *Pan American Airways, Inc.* v. *Civil Aeronautics Board,* 84 U. S. App. D. C. 96, 97, 171 F. 2d 139, 140 (1948). The Act does not distinguish between expenses in service and subsidy cases.

Formerly a mail rate was not even divided into service and subsidy elements. Now §406(c) of the Act requires such a division but nowhere did Congress say the Board

could treat a legitimate expense as incurred in one year for service rate purposes but in a later year for subsidy purposes. The Board first determines under §406(b) the carrier's reasonable compensation for carrying mail in light of the expenses involved in providing that service and then what subsidy, if any, the carrier needs to achieve the statutory objectives, including "compensation for the transportation of mail sufficient to *insure* the performance of such service." Performance of mail service cannot be insured unless *all* legitimate expenses incurred in providing that service are covered. When—as here—the Board fixes a rate for a past period, even "unusual and unforeseen costs" properly incurred must "be treated as facts." *American Overseas Airlines, Inc.* v. *Civil Aeronautics Board,* 103 U. S. App. D. C. 41, 47, 254 F. 2d 744, 750 (1958).

B. *The Basic Facts.* Foreign law imposed on TWA an obligation to pay compensation for an employee's work in R, a review year, consisting of (a) wages paid currently in R, and (b) deferred wages (called a termination indemnity) payable when the employment ended in a later year, Y.

Realistically, both payments were expenses incurred during R—a part of TWA's cost of doing business in that year.[47] The deferred installments were clearly not part

[47] Thus, the Board holds the costs of a plan to provide employees pensions in the future are proper expenses in subsidy cases because they "are in fact part of the cost currently required to retain the services of veteran employees, and as such properly chargeable to current operating expenses." *Pan American World Airways, Inc., Latin American Division, Mail Rates,* 12 C. A. B. 250, 252 (1950); *Reopened Delta-C&S Mail Rate Case,* 28 C. A. B. 820, 843 and n. 56 (1959), affd. without discussion of this point, *Delta Air Lines, Inc.* v. *Civil Aeronautics Board,* 108 U. S. App. D. C. 88, 280 F. 2d 636 (1960), cert. den. 364 U. S. 870 (1960).

of the cost of doing business during the later year, Y. TWA had to pay them even if it did no business in Y.

C. *The Basic Principles.* Frequently an expense incurred in R, by reason of activities in R, is not payable until a later year Y. The question then arises whether that expense is properly allocable to R or Y. Attributing the expense to the latter understates the real cost of activities in R and overstates that of activities in Y. Long ago, therefore, it was recognized that a concern on the accrual basis (like TWA) should determine its income by accruing the expense and charging it to R. The accrual is more than good accounting. It is needed to avoid distorting true income.

1. For instance, a tax imposed because of operations in R may not be assessed or payable until Y, but in reality is a charge against income in R. Since the taxpayer's "*true income* for [R] could not have been determined without deducting from its gross income for the year the total costs and expenses attributable to the production of that income during the year," a reserve for the taxes "must have been deducted before the net results of the operations for the year could be ascertained." *United States* v. *Anderson,* 269 U. S. 422, 440 (1926). The deduction is made "*for purposes* of accounting and *of ascertaining true income* for a given accounting period . . ." *Ibid.,* at p. 441.[48]

2. Similarly, compensation for services rendered in R may not be fully payable until Y. Here too the proper procedure is "to establish a reserve and deduct the expense thus set aside in the year in which the related in-

[48] Other tax cases include *Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 378 (1931); *United States* v. *Consolidated Edison Co.,* 366 U. S. 380, 385 n. 5 (1961); *Doric Co.* v. *Commissioner of Internal Revenue,* 341 F. 2d 967, 971 (9 Cir. 1965).

come accrues," *Central Cuba Sugar Co.* v. *Commissioner of Internal Revenue,* 198 F. 2d 214, 218 (2 Cir. 1952), cert. den. 344 U. S. 874 (1952); this method "clearly reflected the *true income.*" *American National Co.* v. *United States,* 274 U. S. 99, 105 (1927).[49]

3. Often a substantial period elapses between accrual of a reserve for an expense in R and its eventual payment in Y. That, however, is not decisive. Rather the issue is whether the expense is actually a part of the cost of activities in R because incurred then. If it is, the accrual is upheld even though the interval between R and Y was considerable.[50]

4. Accruals for a contingent liability are not recognized. Echoing the Board [109], the court said the reserves "may never be wholly paid out" (App. C, p. C20). But while an employee may forfeit his right to an indemnity in exceptional cases (*supra,* p. 14 n. 18), that is immaterial.

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[49] See also, *e.g., Rath Packing Co.* v. *Bacon,* 255 F. Supp. 809, 811-812 (S. D. Iowa 1966); *Avco Mfg. Corp.* v. *Commissioner,* 25 T. C. 975, 1001 (1956). Cases sustaining accrual of other contractual or statutory obligations include *Bebchick* v. *Public Utilities Comm.,* 115 U. S. App. D. C. 216, 221-222, 318 F. 2d 187, 192-193 (1963), cert. den. 373 U. S. 913 (1963); *Pacific Grape Products Co.* v. *Commissioner of Internal Revenue,* 219 F. 2d 862, 869 (9 Cir. 1955); *Commissioner of Internal Revenue* v. *Champion Spark Plug Co.,* 266 F. 2d 347 (6 Cir. 1959); *Kershaw Mfg. Co., Inc.* v. *Commissioner of Internal Revenue,* 313 F. 2d 942 (5 Cir. 1963).

[50] For instance, the interval was five years in *American National Co.* v. *United States,* 274 U. S. 99 (1927); *Schuessler* v. *Commissioner of Internal Revenue,* 230 F. 2d 722 (5 Cir. 1956); up to ten years in *Bebchick* v. *Public Utilities Comm.,* 115 U. S. App. D. C. 216, 221-222, 318 F. 2d 187, 192-193 (1963), cert. den. 373 U. S. 913 (1963); two and a half years in *Commissioner of Internal Revenue* v. *Champion Spark Plug Co.,* 266 F. 2d 347 (6 Cir. 1959); two years in *Frost Lumber Industries, Inc.* v. *Commissioner of Internal Revenue,* 128 F. 2d 693 (5 Cir. 1942); and indefinite in *Ohmer Register Co.* v. *Commissioner of Internal Revenue,* 131 F. 2d 682, 143 A. L. R. 1164 (6 Cir. 1942); *Central Cuba Sugar Co.* v. *Commissioner of Internal Revenue,* 198 F. 2d 214 (2 Cir. 1952), cert. den. 344 U. S. 874 (1952); *Rath Packing Co.* v. *Bacon,* 255 F. Supp. 809 (S. D. Iowa 1966).

(a) No liability is ever certain to be paid. A creditor may forgive a debt, as the Government sometimes forgives taxes, or wait until the statute of limitations has run. Insistence on absolute certainty of full payment would mean that no accrual of an incurred expense would be recognized. Hence even the very strict income tax cases uphold accruals although the "present liability may subsequently be discharged by some condition subsequent," *Helvering* v. *Russian Finance & Construction Corp.*, 77 F. 2d 324, 327 (2 Cir. 1935), or its "amount may be diminished by subsequent events." *Harrold* v. *Commissioner of Internal Revenue,* 192 F. 2d 1002, 1004 (4 Cir. 1951).[51]

(b) The amount of the liability need not be determinable with mathematical exactitude. It suffices if one can "ascertain with reasonable accuracy the amount" even though the accrual may prove only "approximately in accord with what" is "eventually found." *Continental Tie & Lumber Co.* v. *United States,* 286 U. S. 290, 297, 298 (1932).[52]

Here TWA's reserve was carefully accrued on the basis of past experience [992, 1089]. Even the Board's witness admitted there was "little likelihood" the money accrued would not be fully paid [933].

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[51] See also, *e.g., Frost Lumber Industries, Inc.* v. *Commissioner of Internal Revenue,* 128 F. 2d 693, 696 (5 Cir. 1942); *Ohmer Register Co.* v. *Commissioner of Internal Revenue,* 131 F. 2d 682, 686, 143 A. L. R. 1164, 1170-1171 (6 Cir. 1942); *Central Cuba Sugar Co.* v. *Commissioner of Internal Revenue,* 198 F. 2d 214, 217-218 (2 Cir. 1952), cert. den. 344 U. S. 874 (1952).

[52] See also, *e.g., Harrold* v. *Commissioner of Internal Revenue,* 192 F. 2d 1002, 1006 (4 Cir. 1951); *Central Cuba Sugar Co.* v. *Commissioner of Internal Revenue,* 198 F. 2d 214, 217-218 (2 Cir. 1952), cert. den. 344 U. S. 874 (1952); *Schuessler* v. *Commissioner of Internal Revenue,* 230 F. 2d 722, 724 (5 Cir. 1956); *Seiberling Rubber Co.* v. *United States,* 156 Ct. Cl. 219, 226-227, 297 F. 2d 842, 847 (1962); *Southwest Exploration Co.* v. *Riddell,* 362 F. 2d 833, 837 (9 Cir. 1966).

D. *The Subsidy Argument.* The court's basic premise —that a legitimate expense incurred in R because mail was transported during R, and therefore normally allocable to R, could be shifted to a later year Y if the Board fixed a subsidy rather than a service rate—is contrary to the Act (*supra,* pp. 33-35).

1. *American Overseas Airlines, Inc.* v. *Civil Aeronautics Board,* 103 U. S. App. D. C. 41, 47, 254 F. 2d 744, 750 (1958), neither held nor said that a carrier's expenses are any *less* in subsidy cases than "for rate regulation purposes" (App. C, p. C21).[53] It distinguished solely between fixing rates *prospectively* "for the future" (when only "ordinary and necessary expenses are forecast") and *retrospectively* for "a past period" (when all expenses, including "unusual and unforeseen costs," must be treated as "facts"). 103 U. S. App. D. C. at p. 47, 254 F. 2d at p. 750. Utility rates are nearly always fixed prospectively, whereas mail rates are often fixed retrospectively.

Certainly *American Overseas* did not say that the Board should be *less* liberal in recognizing expenses when subsidy was fixed than when a service or utility rate was fixed. If anything, the converse should hold, since the subsidy is designed not only to pay for the mail service provided but also to "*insure* the performance of such service."

2. Although the Board's past practice could not override the clear import of the Act, it does not resolve the point. Perhaps the Board has been "chary" in subsidy cases about recognizing "expenses not actually paid out prior to or during the review period" (App. C, p. C19). No instance has been cited, however, in which the Board

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[53] The only other case cited for that proposition by the court, *Delta Air Lines, Inc.* v. *Civil Aeronautics Board,* 108 U. S. App. D. C. 88, 92, 280 F. 2d 636, 640 (1960), cert. den. 364 U. S. 870 (1960), does not even touch the point.

treated a similar expense imposed by law as allocable to the year when the employee would receive the benefit. Indeed, the Board currently recognizes voluntary "accruals . . . to provide for pensions" to employees of local service airlines as proper expenses for subsidy purposes.[54]

3. Finally, the court offered no sound reason why the Board should treat an expense as incurred in one year in a service or utility rate case but in a later year in a subsidy case.

"The key point," it said, "is that rate regulation and subsidy administration lay the burden on different classes, and different considerations are involved in the allocation of burdens" (App. C, p. C21). Whether an expense is part of the cost of rendering a service in a given year, however, does not depend on the identity of the recipient who pays for the service. Besides, the Government pays for carrying the mail in all cases. A legitimate expense which is part of the carrier's cost of transporting mail during a review year is no less so whether the Government ultimately pays a service rate or a subsidy rate.

This court should correct the Board's major error on this issue "large in significance" (App. C, p. C17).

IV. The Illegal Navigators' Strike Issue

In addition to important questions of novel impression on the accommodation of the Railway Labor Act to the Act's subsidy provision, this issue raises basic problems in the administration of §406(b).

A. *The Basic Public Policy Violated by the Illegal Strike.* The "basic policy of national legislation" is to

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[54] C. A. B. Economic Regulations, Part 241, Account 57; 14 C. F. R. 241, Section 13, Account 57 (1967) as amended by ER-483, January 23, 1967, 32 Fed. Reg. 2811; *Investigation of the Local Service Class Subsidy Rate,* Order E-23850, dated June 23, 1966, p. 11.

"promote the arbitral process as a substitute for economic warfare." *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America* v. *Lucas Flour Co.*, 369 U. S. 95, 102 (1962).

That policy underlies the Railway Labor Act (48 Stat. 1185, 45 U. S. C. §151 ff.), which applies to air carriers (*supra*, p. 16 n. 21). "Minor" disputes must be settled without striking; even in "major" disputes, lengthy statutory procedures must be "exhausted before resort can be had to self-help." *Elgin, Joliet & Eastern Rd. Co.* v. *Burley*, 325 U. S. 711, 725 (1945).

ALNA's contract with TWA implemented that public policy by providing for submitting disputes to a board established under the Railway Labor Act and forbidding strikes until the procedures of that statute had been exhausted [1213]. Both the statute and the contract required ALNA to arbitrate any dispute and forbade the economic pressure of a strike. This court has repeatedly upheld that salutary policy.[55] The Board's decision eroded it.

B. *The Board Eroded the Policy Underlying the Railway Labor Act and ALNA's No-Strike Covenant.* Not only did ALNA call the strike in defiance of Congress' policy and its own contract, but it refused to stop it lest it lose its "bargaining power" [1073]—the illegal bargaining power which the Railway Labor Act prohibited and ALNA had agreed not to use. As TWA did not capitulate

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[55] See, *e.g.*, *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448, 453, 455 (1957); *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564, 566 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 581 (1960); *Local 174, etc.* v. *Lucas Flour Co.*, 369 U. S. 95, 104 (1962); *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, 246 (1962); *Drake Bakeries, Inc.* v. *Local 50, etc.*, 370 U. S. 254, 263-264 (1962); *Local Union No. 721, etc.* v. *Needham Packing Co.*, 376 U. S. 247, 251-252 (1964).

promptly to ALNA's unlawful economic duress, the Board termed it "intransigeant," relying improperly on subsequent concessions obtained by the duress.

1. *The Improper Reliance on Concessions Obtained by Illegal Duress.* In a passage which the court called "its critical finding" (App. C, p. C8), the Board said: "ALNA's request for reinstatement of the discharged navigators was not an unreasonable one, even though the strike itself was illegal; TWA in fact acceded to this request in the ultimate settlement of the strike" [752].[56]

If ALNA thought the discharged navigators should be reinstated, its proper remedy was to end the strike and arbitrate the point. Persistence in its unlawful strike to force acceptance of its demand only aggravated its illegal conduct. Both the Railway Labor Act and the no-strike covenant prohibit use of the economic pressure of a strike to extort concessions from an employer. Here that pressure was illegal duress, to which TWA bowed as the "lesser of two evils." *Union Pacific Rd. Co.* v. *Public Service Comm.*, 248 U. S. 67, 70 (1918); *Abie State Bank* v. *Bryan*, 282 U. S. 765, 776 (1931); *Garrity* v. *New Jersey*, 385 U. S. 493, 498 (1967).

Concessions obtained by illegal duress may not be used to the prejudice of the victim of the duress. Illegality does not "change character from its success." *United States* v. *Di Re*, 332 U. S. 581, 595 (1948); *Ker* v. *California*, 374 U. S. 23, 40 n. 12 at 41 (1963). Unlawful duress vitiates whatever significance an act induced by it might have if voluntary.[57]

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[56] The factual errors in that finding are noted *supra*, p. 20.

[57] See the cases cited in the preceding paragraph and *Nishiwaka* v. *Dulles*, 356 U. S. 129, 136-137 (1958).

Equally improper was the Board's reliance, to TWA's prejudice, on other concessions or supposed admissions made in the settlement agreement (*supra*, p. 20).[58]

2. *The Improper Holding That TWA Imprudently Did Not Capitulate Sooner to the Illegal Duress.* The Board held TWA should have acceded sooner than it did to the unlawful economic pressure of the strike, and penalized it by hundreds of thousands of dollars because it did not appease ALNA sooner. This sanction frustrated the basic policy of the Railway Labor Act. Carriers are forced to bargain under the unlawful duress from which Congress wanted them free when they run the risk of losing mail pay if they resist illegal strikes stoutly. Conversely, unions are encouraged in illegal strikes when they know that carriers will not resist long because of that risk.

Judge Cardozo said long ago that "the law, which creates a right, can certainly not concede that an insistence upon its enforcement is evidence of a wrong." *Morningstar* v. *Lafayette Hotel Co.*, 211 N. Y. 465, 468, 105 N. E. 656, 657 (1914). Here the Board held to the contrary, eroding the salutary policy of the Railway Labor Act. But its plain duty was to administer §406(b) to effectuate that policy. *Southern Steamship Co.* v. *National Labor Relations Board*, 316 U. S. 31, 46-48 (1942); and see *supra*, pp. 21-22.

C. *The Board Improperly Determined That TWA Was Inefficient and Uneconomical.* According to the

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[58] The court sought to support the "intransigeance" theory by citing non-existent facts on which the Board did not rely (*supra*, pp. 16-17). But an administrative decision cannot be sustained on a ground which the agency itself avoided taking, *Securities & Exchange Comm.* v. *Chenery Corp.*, 332 U. S. 194, 196 (1947); *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 168-169 (1962); *National Labor Relations Board* v. *Metropolitan Life Ins. Co.*, 380 U. S. 438, 444 (1965), and the Board's improper reliance on the concessions or supposed admissions completely infected its conclusion of "intransigeance."

Board, "good labor relations is not simply a matter of strict observance of and insistence upon legal and contractual rights and duties," but "also of relations among human beings, and due account must be taken of ordinary human attitudes and emotions" [750]. It then ignored its own criterion.

Executives as well as employees are "human beings" with "ordinary human attitudes and emotions." ALNA's illegal strike confronted TWA's management with a serious dilemma. The Board did not even mention it, although warned in an earlier strike case: "Many different operations—different in policy, in mode, and in result—may all be honest, economical and efficient. It is not enough for the Board to say that an operation it designs and favors meets those tests and it will approve that course and none other. The operation by the company may also be honest, economical and efficient." *American Overseas Airlines, Inc.* v. *Civil Aeronautics Board,* 103 U. S. App. D. C. 41, 46, 254 F. 2d 744, 749 (1958).

ALNA refused to call off the illegal strike unless the discharged navigators were reinstated unconditionally [1072].[59] Quick capitulation to the demand would have rendered TWA more vulnerable to future strikes and jeopardized its long-range program to eliminate needless costs. In addition, TWA would run the risk that the Board would claim that appeasement was the wrong policy and it was inefficient and uneconomical not to resist the unlawful strike longer.

[59] At the time, it was generally believed an illegal strike could not be enjoined [1052-1053]. Not until four years later did this court hold that a strike violating the Railway Labor Act could be enjoined despite the Norris-La Guardia Act. *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana Rd. Co.,* 353 U. S. 30 (1957).

Stout resistance, the other alternative, could be far more prudent. Here ALNA did not contest TWA's right to stop using navigators after it met determined resistance. The progressive decrease in force saved over $2,000,000 in payroll costs alone [1185]. No further strike occurred [1332].[60] Certainly TWA's management could reasonably conclude a firm course would have that beneficial effect.[61] On the other hand, it exposed TWA to the risk that the Board would claim that appeasement was the right policy and it was inefficient and uneconomical to resist the unlawful strike longer.

ALNA's illegal duress thus posed hard alternatives. "In reality, the carrier [was] given no choice, except a choice between the rock and the whirlpool . . ." *Frost & Frost Trucking Co.* v. *Railroad Comm.*, 271 U. S. 583, 593 (1926); *Stevens* v. *Marks*, 383 U. S. 234, 243 (1966); *Garrity* v. *New Jersey*, 385 U. S. 493, 496 (1967).

What this court said recently of a policeman should apply equally to an air carrier; its "lot is not so unhappy that [it] must choose between being charged with dereliction of duty" no matter which course it follows. *Pierson* v. *Ray*, 386 U. S. 547, 555 (1967).

"Whether or not in any particular instance there should be submission and payment or stout resistance thus neces-

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[60] The Board's argument that TWA's 1953 position averted future strikes was "pure speculation" [752] only points up the cruel dilemma facing TWA. No matter which course it chose, TWA could never prove conclusively what would have happened if another course had been followed. The fact remains that TWA's management could well believe that firm resistance would avert future strikes and history shows they actually were averted.

[61] "The strike was in breach of the agreement and the company proposed to carry on within its terms when the men went back to work—a proposal again within the *normal* processes of collective bargaining." *Timken Roller Bearing Co.* v. *National Labor Relations Board*, 161 F. 2d 949, 955 (6 Cir. 1947).

sarily must rest in the discretion of the persons constituting the management of the corporation like other business questions in general . . .'' *Hornstein* v. *Paramount Pictures, Inc.*, 22 Misc. 2d 996, 1008, 37 N. Y. S. 2d 404, 417 (N. Y. Cty. 1942), affd. 266 App. Div. 659, 41 N. Y. S. 2d 210 (1st Dept. 1943), affd. 292 N. Y. 468, 55 N. E. 2d 740 (1944).

Congress did not leave the choice to the Board. Its ''experience and expertise is with transportation not labor relations problems.'' *Outland* v. *Civil Aeronautics Board*, 109 U. S. App. D. C. 90, 94, 284 F. 2d 224, 228 (1960). The Board is ''not empowered to substitute its judgment for that of the directors of the corporation . . .'' *Southwestern Bell Telephone Co.* v. *Public Service Comm.*, 262 U. S. 276, 289 (1923); *West Ohio Gas Co.* v. *Public Utilities Comm. of Ohio (No. 1)*, 294 U. S. 63, 72 (1935). By doing so, it not only eroded the policy of the Railway Labor Act but also exceeded the authority conferred by §406(b) of the Act.

CONCLUSION

For these reasons, this petition for a writ of certiorari should be granted.

Dated: December 8, 1967

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APPENDIX A